U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

EX PARTE OR LATE FILED

December 12, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW Suite 222
Washington, DC 20554

RE: Notice of Ex parte Presentation in a Non-Restricted Proceeding
In re Toll Free Access Service Codes, CC Dkt. No. 95-155

Dear Ms. Salas:

The Office of Advocacy, U.S. Small Business Administration (SBA), by its undersigned representative and in accordance with Sections 1.415, 1.419 of the Commission's rules, hereby respectfully submits an original and six copies of comments for the above-referenced proceeding. To the extent that a waiver is necessary, we respectfully request the Commission's approval of this late filing.

Thank you for your assistance in this matter. Please call with any questions.

Very truly yours,

S. Jenell Trigg
Assistant Chief Counsel for
Telecommunications
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
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Enclosure

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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Toll Free Service Access Codes	)	CC Docket No. 95-155
	)	
	)	

EXPARTE PETITION FOR RECONSIDERATION OF THE SECOND REPORT AND ORDER FOR TOLL FREE SERVICE ACCESS CODES FROM THE OFFICE OF ADVOCACY OF THE UNITED STATES SMALL BUSINESS ADMINISTRATION

Jere W. Glover, Chief Counsel
S. Jenell Trigg, Assistant Chief
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December 12, 1997

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EXECUTIVE SUMMARY

The Office of Advocacy of the United States Small Business Administration (SBA) submits the following *Ex parte* Petition for Reconsideration in the above-captioned proceeding. The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include reviewing federal government policies and regulations that affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). The Office of Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

Advocacy appreciates this opportunity to share its concerns with the Commission on the record regarding *In re* Toll Free Service Access Codes *et al.*, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 95-155, FCC 97-123, (rel. Apr. 11, 1997). Our primary concern is 47 C.F.R. § 52.107.

Advocacy details the tremendous economic impact on small businesses that this *Second Report and Order* will impose. Most importantly, these comments also detail the material flaws in the *Second Report and Order's* Final Regulatory Flexibility Analysis ("FRFA") and provides a recommendation on how the Commission can meet the requirements of the RFA and the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 553, 706. A FRFA, as a matter of law, is required when there is a "significant economic impact on a substantial number of small entities." *See* 5 U.S.C. § 605.

Advocacy asserts that the Commission has not complied with the statutory requirements of notice and comment rulemaking pursuant to the APA and RFA by: 1) failing to provide proper public notice of a proposed rule to small businesses in the Notice of Proposed Rulemaking ("*NPRM*") and the Initial Regulatory Flexibility Analysis ("IRFA"); 2) finalizing a rule that is not a logical outgrowth of the *NPRM*; 3)failing to identify properly, describe, and reasonably estimate the number of all small entities to which these rules will apply; 4) failing to detail all of the compliance requirements that small businesses subject to the rule must undertake; and 5) failing to analyze the impact of its rules on small business end users, and small business toll free providers, especially those engaged in the secondary market.

Toll free use also involves the provision of toll free service by entities that are not telecommunications companies such as local exchange or interexchange carriers, paging providers, cellular or PCS providers, or Resp Orgs (which are often subsidiaries of telephone companies). The variety of private entities that also provide access to a toll free number, (either by sale or lease) are loosely classified as the secondary market. The Commission has not explained in the substantive body of the *Second Report and Order*, nor the FRFA, how the *ex post facto* finding of illegality for the sale of a toll free number or the possession of multiple toll free numbers, including the provision of forfeitures and criminal sanctions for hoarding and brokering, serves to encourage rapid private sector deployment in all telecommunications markets as envisioned by Congress. Neither has the

Commission fully explained nor justified how the elimination of businesses engaged in the secondary market deplete an allegedly scarce resource and/or does not serve the public interest. Advocacy asserts that this *Second Report and Order* is in direct contradiction to the congressional intent of the 1996 Act to foster competition in all telecommunications markets.

Advocacy is very concerned that the actual implementation of these rules established in the *Second Report and Order* will impose egregious harm on the economic welfare of millions of small businesses throughout the country that have value in and a reasonable, productive, and prudent use for their toll free numbers. Failure to recognize the marketplace realities arguably supports a characterization of the Commission's *Order* as arbitrary.

For these reasons, the Office of Advocacy respectfully requests that the Commission grant the petitions for an emergency stay of the rule, and rescind Sec. 52.107 in its entirety. It is evident by record evidence and marketplace realities, that Section 52.107, as drafted, cannot stand. At minimum, revision of the rule is necessary to clarify exactly what behavior is prohibited, what entities are subject to the rule, what entities are exempt, and who should enforce the rule under proper due process. These revisions should be made and released for proper notice and comment in a Further Notice of Proposed Rulemaking that includes a properly executed Initial Regulatory Flexibility Analysis.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Toll Free Service Access Codes	)	CC Docket No. 95-155
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EXPARTE PETITION FOR RECONSIDERATION OF THE SECOND REPORT AND ORDER FOR TOLL FREE SERVICE ACCESS CODES FROM THE OFFICE OF ADVOCACY OF THE UNITED STATES SMALL BUSINESS ADMINISTRATION

The Office of Advocacy of the United States Small Business Administration (SBA) submits the following *Ex parte* Petition for Reconsideration in the above-captioned proceeding.[1] The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include reviewing federal government policies and regulations that affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). The Office of Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness

[1] *In re* Toll Free Service Access Codes *et al.*, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 95-155, FCC 97-123, (rel. Apr. 11, 1997) ("*Second Report and Order*").

Act of 1996 ("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

The Office of Advocacy appreciates this opportunity to share its concerns with the Commission on the record regarding the *Second Report and Order*. Our primary concern are the provisions adopted in 47 C.F.R. 52.107. Advocacy must admit that, at first glance, these provisions appeared innocuous enough. We fully support the Commission's objective in ensuring that toll free numbers are distributed and used efficiently. However, when Advocacy learned of the numerous classes of small entities to which the rule will apply and how these small businesses are affected by the rule, we have concluded that this rule has a potential to destroy hundreds of small businesses in certain categories and will also impact the millions of small businesses that use toll free service.

In its development of these comments, Advocacy has reviewed a considerable part of the record since 1995 and has spoken to a number of industry representatives including advertising/marketing professionals, numerous small businesses providing toll free service or engaged in the secondary market, and small business end users. It is Advocacy's objective to highlight the tremendous economic impact on small businesses that this *Second Report and Order* will impose and to recommend significant alternatives for the Commission to consider in its re-evaluation of this rule. Most importantly, these comments also detail the material flaws in the *Order's* Final Regulatory Flexibility Analysis ("FRFA") and provides a recommendation on how the Commission can meet the requirements of the RFA and the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 553, 706.

I. The Commission's Final Regulatory Flexibility Analysis Does Not Comply With the Statutory Requirements of the Administrative Procedure Act nor the Regulatory Flexibility Act.

The Office of Advocacy asserts that the Commission has not complied with the statutory requirements of notice and comment rulemaking pursuant to the APA and RFA by: 1) failing to provide proper public notice of a proposed rule to small businesses in the Notice of Proposed Rulemaking ("*NPRM*") and the Initial Regulatory Flexibility Analysis ("IRFA"); 2) finalizing a rule that is not a logical outgrowth of the NPRM; 3) failing to identify properly, describe, and reasonably estimate the number of all small entities to which these rules will apply; 4) failing to detail all of the compliance requirements that small businesses subject to the rule must undertake; and 5) failing to analyze the impact of its rules on small business end users, and small business toll free providers, especially those engaged in the secondary market.

The Regulatory Flexibility Act of 1980 was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.[2] Major objectives of the RFA are: 1) to increase agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.[3]

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[2] *See* 5 U.S.C. § 601(4)-(5).

[3] U.S. Small Business Administration, Office of Advocacy, *A Guide to the Regulatory Flexibility Act*, May 1996.

On March 29, 1996, the SBREFA was signed into law and, *inter alia*, amends the RFA to allow judicial review of an agency's compliance with the RFA. 5 U.S.C. § 611.[4]

The RFA, as amended, does not seek preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing the burden on small entities. 5 U.S.C. § 604. This analysis, as a matter of law, is required when there is a "significant economic impact on a substantial number of small entities." *See* 5 U.S.C. § 605.

Pursuant to the APA, the FCC is also required to issue rational rules.[5] To determine whether the results of informal rulemaking meet that standard, the rulemaking record must support the factual conclusions underlying the rule, the policy determinations undergirding the rule must be rational, and the agency must adequately explain its conclusions.[6] Therefore, the failure to examine less burdensome alternatives on the "whole record" that impact small businesses and to follow statutory procedural

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[4] The sections of the RFA that are subject to independent judicial review of final agency action are Sections 601, 604, 605(b), 608(b) and 610. 5 U.S.C. § 611. Sections 607 and 609(a) shall be reviewable in connection with the judicial review of section 604. *Id.*

[5] *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Bowen v. American Hospital Association*, 476 U.S. 610, 643-45 (1986).

[6] *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994).

requirements of notice and comment rulemaking or the RFA violates the APA.[7] Even prior to the SBREFA amendments, courts have held that failure to undertake a proper regulatory flexibility analysis as part of the rulemaking could result in arbitrary and capricious rulemaking.[8]

A. The Initial Regulatory Flexibility Analysis was Inadequate and Did Not Provide An Adequate Foundation for the FRFA, Therefore the Final Rule is Arbitrary and Capricious.

Congress recognized that "small businesses bear a disproportionate share of regulatory costs and burdens." SBREFA, § 202(2), codified at 5 U.S.C. § 601 Note. Therefore, the first stage of a sufficient regulatory flexibility analysis of a final rule is the IRFA in which the FCC shall, *inter alia*, provide

> (b)(3) a description of and, where feasible, an estimate of the number of small entities to which the rule shall apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record; . . . [and]
> (c) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

5 U.S.C. § 603. It is also incumbent on the agency to identify "a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable." 5 U.S.C. §§ 603, 607. Proper implementation of this section is critical at the *NPRM* stage, so that such impact, either detrimental or beneficial, will have the opportunity for

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[7] *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).
[8] *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983).

public notice and comment.[9] Done properly, the IRFA provides the foundation for not only for an adequate FRFA, but for an informed decision-making process for the Commission given the benefit of comments from all interested parties.

The IRFA in this proceeding did not fulfill any of the aforementioned statutory requirements. [10] In fact, the IRFA admitted that the proposals in the *NPRM* "may have a significant economic impact on a substantial number of small entities"[11] but did not analyze this impact nor offer significant alternatives that would help to minimize the impact. Advocacy is aware that the *NPRM* for this proceeding was adopted and released prior to the amendments to the RFA in 1996. However, it is important to note that the requirements of the IRFA are not new under the SBREFA amendments, but have been staples of the RFA since 1980. Pub. L. No. 96-354, § 2(b), 94 Stat. 1164 (1980). Thus, the IRFA was also in violation of the RFA.

1. The IRFA Was Inadequate Because the *NPRM* Did Not Propose an Actual Rule and Therefore, Did Not Provide Public Notice Under the APA.

The material deficiencies of the IRFA are attributable to a material deficiency in the *NPRM*. The purpose of the *NPRM* in this proceeding was to give general notice to affected persons of "<u>either the terms or substance of the proposed rule or a description of the subjects and issues involved</u>." 5 U.S.C.§ 553(b)(3) (emphasis added). However, the *NPRM*, from the onset, did not contain proper notice of the Commission's final rule

[9] 126 Cong. Rec. 24,588 (Sept. 8, 1990) ("the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse").
[10] *In re* Toll Free Service Access Codes, *Notice of Proposed Rulemaking*, 10 FCC Rcd. 13692, 13707 (1995).
[11] *Id.*

(Section 52.107) and therefore, violated the APA and RFA.[12] Both the *NPRM* and the IRFA are devoid of any mention of the specific topics and issues addressed in Section 52.107 such as a rebuttable presumption of illegal behavior for the possession of multiple toll free numbers, a blanket prohibition of hoarding and brokering and the imposition of civil and criminal penalties.

The Commission does make a general inquiry about "what actions the Commission can take to discourage Resp Orgs or 800 Subscribers from warehousing or hoarding toll free numbers and what remedy would be appropriate for such violations."[13] However, this general request for comment is more of a Notice of Inquiry, not a NPRM. This *NPRM* contains no actual terms or draft of a proposed rule. Nor does it provide any indication to interested parties that the Commission was contemplating such drastic measures on the entire toll free industry, including a new definition of illegal behavior and application of the rule to classes of entities beyond those addressed in the *NPRM*. The general request for comments addressed Resp Orgs and subscribers, not businesses engaged in telemarketing or the secondary market of providing toll free service. Small businesses engaged in toll free service as telemarketers, catalog sales, or those engaged in the sale of numbers in the secondary market did not have proper notice that this proceeding would have such a direct impact on their businesses. Small business end users, although identified in the *NPRM*, did not have any indication that they would be presumed to be committing an illegal act if they had more than one toll free number, and for this

[12] *See Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994), *cert denied*, 115 S. Ct. 72 (1994).
[13] *NPRM*, para. 16.

behavior, their service could be terminated. Also, small business end users or those in the secondary market were not aware that they could be subject to civil and criminal penalties.

Section 52.107 is not an acceptable "logical outgrowth" of the *NPRM* because the final rule was the result of the public's response to a general inquiry, and not to an actual proposed rule.[14] Even if the record evidence supports the Commission's extension of the final rule beyond Resp Orgs and end users it identified in the *NPRM* to the entire toll free industry, the Commission was still obligated under the APA to have formally submitted for public notice and comment, *prior* to adoption of the final rule, the agency's recommendation, discussion of the impact of the proposed rule on all small entities, and a range of alternatives being considered.[15]

Even if the *NPRM* is deemed to be an adequate proposed rule under the APA, the final rule is still not a logical outgrowth of the *NPRM*. The Commission does not have "carte blanche" to establish a rule contrary to the one proposed merely because it receives proposals to alter the rule during the comment period.[16] Advocacy does not submit that the Commission may not promulgate a final rule that may differ from the one proposed given the information it receives from commenters. The final rule, however, to qualify as a logical outgrowth, must have been reasonably anticipated from the rule proposed.[17] Here, Section 52.107's provisions were not anticipated by entire classes of small entities.

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[14] *National Mining Assoc. v. Mine Safety and Health Admin.*, 116 F. 3d 520, 531 (D.C. Cir. 1997) ("No further notice and comment is required if a regulation is a 'logical outgrowth' of the proposed rule.") (emphasis added).

[15] *Horsehead Resource Dev.*, 16 F.3d at 1268 (comments addressed to one specific component part . . . do not necessarily bear on the validity of the [industry] as a whole").

[16] *Chocolate Mfrs. Ass'n of United States v. Block*, 755 F. 2d 1098, 1104 (4th Cir. 1985).

[17] *National Mining*, 116 F.3d at 531.

The prohibition on hoarding and brokering is a change in the Commission's policy and therefore, the general request for remedies in the *NPRM* did not put all effected parties on notice. Advocacy is not aware of any Commission rule that explicitly and expressly prohibits hoarding, brokering, or the possession of multiple toll free numbers, with or without civil forfeitures and criminal sanctions. The Commission may not have condoned hoarding or brokering, but it did not outlaw it either, until now. Therefore, the rules set forth in *the Second Report and Order* are new rules which reflect a change in FCC policy and thus, were subject to proper public notice and a reasoned analysis.[18]

Advocacy is also aware that this proceeding has been ongoing since 1995. It is incumbent upon the Commission to provide outreach during the rulemaking process to small businesses that will be affected by the rule. 5 U.S.C. § 609.[19] In this instance, given the radical change in FCC policy and its significant impact on small businesses, publication of the *NPRM* in the Federal Register in 1995[20] was not sufficient outreach to bring a final rule adopted in 1997 into compliance with the RFA. A more concerted effort by the Commission should have been made to gauge the impact on small business end users and the secondary market.[21]

Given the FCC's lack of full disclosure of the impact on small business end users and secondary market in the *NPRM*, the IRFA, and an absence of adequate outreach under 5 U.S.C. § 609, it is not surprising that many small businesses, even those in the industry,

[18] *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983); *AT&T v. FCC*, 974 F.2d 1351, 1355 (D.C. Cir. 1992).
[19] The Commission's outreach efforts are also judicially reviewable. 5 U.S.C. § 611.
[20] 60 Fed. Reg. 53157 (1995).
[21] Tellnet Communications, Inc., July 8, 1997, at 3 ("Tellnet Comments").

were unaware of the actual economic impact of the final rule until it was released this year.[22]

In its implementation of Section 257, Market Entry Barriers, of the Telecommunications Act of 1996, the Commission acknowledged in its statutory mandated *Report* that a "significant procedural barrier [for small businesses] is the manner in which Commission rules are proposed and adopted."[23] The instant proceeding is an excellent example of how Commission rulemaking procedures serve as a market entry barrier to small businesses.

B. The FRFA Violates the RFA Because It Did Not Identify All the Small Businesses Engaged in Providing Toll free Service To Which The Rule Will Apply.

In the FRFA, the Commission is obligated by the RFA and the APA to discuss the obvious and asserted impact on all affected small entities raised by record evidence, whether or not these issues were raised as separate IRFA comments. The Commission is required to "includ[e] a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5) (emphasis added). The RFA does not state in this section

[22] *See e.g.*, ICB Petition for Reconsideration and Clarification, May 27, 1997 ("ICB Petition"); Mark D. Olson & Assoc., Inc. Petition for Reconsideration, May 5, 1997 ("Olson Petition"); National Assoc. of Telecommunications End-users Reply and Further Comments, July 10, 1997 ("NATE Further Comments"); NATE Petition for Reconsideration and Emergency Petition Requesting Stay of Enforcement, May 22, 1997 ("NATE Emergency Petition"); Tellnet Comments; Michael West (General Marketing Co.), Sept. 2, 1997 ("West Comments"); Vanity International, Inc., Petition for Stay and Reconsideration, 1997 ("Vanity Int'l Petition"). None of these commenters, except for Vanity Int'l and Mark D. Olson, filed comments or reply comments in response to the NPRM.

[23] *In re* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, GN Dkt. No. 96-113, FCC 97-164, para. 70 (rel. May 8, 1997) (citing Comments of the Cable Telecommunications Association).

that only comments and alternatives raised in response to the IRFA must be considered.[24] Such comments are also part of the whole record, and the Commission is obligated to review and address all significant issues.[25]

The first step in this analysis, identical to the IRFA, is to identify all of the small entities to which the rule will apply. 5 U.S.C. § 604.[26]

In the *Second Report and Order*, there are several classes of small entities that are affected. In the section entitled *Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*, paras 116 - 137, the Commission has done an outstanding job of identifying and estimating the number of the traditional industry entities, i.e., interexchange carriers, telephone companies, Resp Orgs, PCS, cellular, etc. However, the Commission fails to identify, describe, and estimate the entire class of small businesses that provide toll free service, including those on the secondary market. The Commission does include a generic listing of Toll Free Subscribers,[27] but businesses such as telemarketing companies (SIC Code 7389), public relations firms (SIC Code 8743); marketing consultants (SIC Code 8742), advertising agencies (SIC Code 7311), commercial catalog publishers (SIC Code 2741 and retail/mail-order firms (SIC Code 5961), direct mail

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[24] *See id.*

[25] *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir.), *cert denied*, 113 S. Ct. 57 (1992); *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992); *David Ortiz Radio Corp. c. FCC*, 941 F. 2d 1253 (D.C. Cir. 1991); *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153 (D.C. Cir. 1987).

[26] The holding of the D.C. Circuit in *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 773 F.2d 327 (D.C. Cir. 1985), that an analysis of "unregulated entities." is not relevant in this proceeding because the Commission has directly imposed regulations on all toll free subscribers. Under *Mid-Tex*, a regulated entity is an entity who is "subject to the rule." *Id.* at 341. Therefore, any small business that is a subscriber of toll free service is a regulated entity. A regulated entity is not limited to an entity in a field that is traditionally controlled by a pervasive regulatory scheme, such as railroads, telephone companies, or broadcasters. *See also* 5 U.S.C. §§ 603(b)(3), 604(a)(3) (defining small entities to be identified in an IRFA and FRFA as those "to which the rule will apply").

[27] *Second Report and Order*, para. 119.

advertising services (SIC Code 7331), computer customer services (See generally SIC Industry Group 731 Businesses Services); and bundled and shared-use providers (see telemarketing), are very different from a typical "subscriber."[28] A description and estimate of the number of these entities should have been included in the IRFA and the FRFA. The economic impact of these rules on the secondary market is also different and more substantial than the impact on a typical subscriber. *See infra* Section II.

It is incumbent upon the Commission to have full knowledge of the entities involved in the industries it regulates, even in the absence of record evidence, given the severe detrimental impact on small businesses in the secondary market. The Commission should have included, based on its expertise and on its own initiative, the various classes of providers of toll free numbers in its FRFA, particularly since the secondary market has flourished for many years.[29]

Although no comments were filed directly on the IRFA, the general comments included some indication of the number of small entities and the economic impact on the secondary market and subscribers. For example, comments filed by the Direct Marketing Association and NIMA International, Inc., in 1995, addressed their concerns on behalf of 3,500 and 470 member companies, respectively.

In these comments, Advocacy provides information that identifies many of the various types of small businesses affected by this proceeding. We do not purport to be experts on the toll free industry. Our comments reflect a compilation of the record,

[28] A provider on the secondary market can also be an end user/subscriber if the provider uses his own toll free number for providing access to toll free service to a third party. Some secondary market providers sell or lease toll free service for non-subscribed numbers.

[29] *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir 1988) (noting the FCC's duty to gather relevant information and make necessary analyses before reaching a conclusion).

discussions with many small businesses, and some institutional knowledge. However, it remains the Commission's duty to glean this information from the comments and other available resources.[30] We encourage the Commission to undertake outreach to different small business entities in its re-evaluation of this entire proceeding (including the issues specifically related to vanity numbers) to better ascertain the workings of the toll free industry.

C. The FRFA Violates the RFA Because It Did Not Include All the Compliance Requirements That Small Entities Must Undertake.

The section titled *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements* did not include the compliance requirement that toll free service carriers must terminate the service of a subscriber if the subscriber is suspected of hoarding or brokering numbers.[31] The Commission has acknowledged that telephone companies, cellular, paging, and PCS carriers may be small. The Commission's mandate that carriers must terminate a subscriber's service is an "other compliance requirement." The changes in lag time and warehousing rules for Resp Orgs should also have been included in this section.

D. The FRFA Violates the RFA Because It Did Not Analyze the Significant Economic Impact on All Small Business Entities To Which the Rule Will Apply.

Advocacy is primarily concerned that the Commission did not fulfill the statutory mandates under the RFA, as amended, by properly analyzing the "significant economic impact" of its rules on small businesses engaged in the provision of toll free

[30] *See e.g.*, Direct Marketing Association Comments, Nov. 1, 1995 ("DMA Comments"); NIMA International Comments, Nov. 1, 1995 ("NIMA Comments").
[31] *Second Report and Order*, para. 138.

numbers on the secondary market and small business end users. A proper analysis would have uncovered the fact that a wholesale class of small business activity would be declared illegal by Section 52.107, i.e., the possession of more than one toll free number, the sale of toll free numbers as part of telemarketing or shared-use services, the brokering of vanity numbers on behalf of a client, or the sale of one toll free number by one subscriber to another, even if the number had not been initially acquired with the specific intent to sell it and the buyer initiated the sales transaction.

The IRFA acknowledged that "toll free numbers are essential to many business both in terms of marketing and advertising products. Toll free numbers may also have intrinsic value to many businesses."[32] Yet in the *Second Report and Order*, the Commission neglects to justify its policy and analyze the impact of the rule on subscribers whose toll free numbers are "essential" and have "intrinsic value." In this comment, Advocacy discusses in detail the significant economic impact imposed on the different classes of small businesses.

The Commission has only one viable option at this stage of the proceeding - to rescind the rule in its entirety, and reissue a revised proposed rule including a new Initial Regulatory Flexibility Analysis. It is evident by record evidence and marketplace realities, that Section 52.107, as drafted, cannot stand. At minimum, revision of the rule is necessary to clarify exactly what behavior is prohibited, what entities are subject to the rule, what entities are exempt, and who should enforce the rule under proper due process These revisions should be made and released for proper notice and comment in a Further

[32] *Second Report and Order*, para. 138.

Notice of Proposed Rulemaking that includes a properly executed Initial Regulatory Flexibility Analysis.

Simply revising the final rule and the FRFA at this stage would render the RFA insignificant given that the purpose of the RFA is for the Commission to take into consideration the impact on small business *during* the initial rulemaking process. 5 U.S.C. § 601 *et seq.* A revised FRFA, given the lack of public notice on the IRFA and the draft of the final rule, compounded by the significant economic impact on entire classes of small entities, would be an impermissible *post hoc* rationalization that would render the revised FRFA itself arbitrary and capricious.[33]

II. The Commission's Rebuttable Presumption That The Possession of More Than One Toll Free Number Indicates Illegal Activity Pre-Determines A Regulatory Outcome that is Extremely Burdensome on Small Businesses.

Advocacy supports the Commission's overall objective in ensuring that toll free numbers are distributed and used efficiently. We too agree that there should be a "sound policy" in this area. However, Advocacy is concerned about the Commission's means to meet this objective. The *Second Report and Order* established a rebuttable presumption that any subscriber with "more than one toll free number" is presumed to be illegally brokering or hoarding numbers. 47 C.F.R. § 52.107. The Commission has found that "'hoarding' and 'brokering' of toll free numbers are contrary to the public interest. . . ." *Second Report and Order*, para. 2

First, Advocacy questions how the Commission can purport to serve the public interest by its adoption of Section 52.107 when it neglected to provide the public with an opportunity to comment on the impact of the rule as drafted? *See supra* Section I. A.

Second, the Commission has not acknowledged in the body of the *Second Report and Order*, nor in the FRFA, that there are many legitimate reasons for the possession of multiple toll free numbers and nor has it justified, on a legal, factual, and policy basis how prohibition of these activities serve the public interest or meet the Commission's objectives. Furthermore, there is a necessary, well established, and burgeoning secondary market for the provision of toll free numbers that is directly affected by this dramatic change in toll free number administration. <u>The issue Advocacy wishes to raise is whether the destruction of hundreds of small businesses is in the public interest and whether there are alternatives to this harsh result that would achieve the Commission's objectives.</u>

The rules in this *Second Report and Order* effectively codified, with minor adjustments, the voluntary *Industry Guidelines for Toll Free Administration* ("Industry Guidelines") set forth by the Ad Hoc 800 Database Committee and sponsored by the Alliance for Telecommunications Industry Solutions, Inc. ("ATIS"). It is important to note that the "industry," for which the guidelines were designed, is dominated by large telecommunications companies.[34] Therefore, it is most likely that such guidelines, which were created by the consensus of big business, precluded the viewpoints of small business end users and small business providers, including those in the secondary market and new

[33] *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[34] *Second Report and Order*, paras. 4 (AT&T established the 800 SAC), 6 n.24 (the SMS database system includes ten regional 800 SCP databases in the U.S., which are independently owned by the largest telephone carriers in the country: Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific Telesis, SBC Communications, SNET, Sprint (Local) and U.S. West), 8 (the SMS database was administered by DSMI, which is a subsidiary of Bellcore, which in-turn, was wholly owned by the original seven RBOCs).

entrants.[35] In fact, the carriers granted to themselves enforcement authority of the guidelines, often in direct conflict with the interest of end users.

The Industry Guidelines state that "Resp Orgs and Toll Free Service Providers are prohibited from selling, brokering, bartering, or releasing for a fee (or any other consideration) any Toll Free Number."[36] However, the Industry Guidelines do not address small businesses that are not Resp Orgs, Toll Free Service Providers, or not part of the traditional telecommunications industry. Moreover, the guidelines state that "the Toll Free Service End-User Subscriber has the ultimate right to control its Toll Free Service, and its reserved, active, or assigned Toll Free Service numbers."[37] The Note to this section further states that "[t]he statements above should not be interpreted as inhibiting the sale, resale, brokering, or bartering of Toll Free Service."[38] Furthermore, the Industry Guidelines are voluntary and loosely enforced by the carriers themselves. The Industry Guidelines do not impede, nor prohibit a subscriber from selling or receiving value for his number.[39]

A. Toll free Numbers Have Significant Value to Small Businesses.

It has been asserted that toll free numbers are public resources and that the subscriber does not have a proprietary interest in the number, neither does a carrier.[40] This lack of "ownership" interest ignores the fact that a number in its numeric or mnemonic form does have significant value to a subscriber, particularly a small business

[35] The Industry Guidelines primarily addressed carrier and Resp Org administration. Many small businesses on the secondary market were not aware of the guidelines, and if they were, the guidelines s themselves support the

[36] Industry Guidelines For Toll Free Number Administration, 2.2.1., Issue 6, October 1996.

[37] *Id.* (emphasis added).

[38] *Id.* (emphasis added).

[39] *Play Time, Inc. v. LDDS Metromedia Communications, Inc.*, 123 F.3d 23 (1st Cir. 1997).

that has limited resources. There is value in the costs incurred by acquiring and using the number (i.e., subscription fees) and in the costs incurred by advertising and marketing of the number (i.e., stationary, business cards, merchandising, television, and print ads). Although the numeric equivalent is not "owned" by the subscriber, a vanity number may have considerable value because of the tremendous investment made by the subscriber in development of a business/marketing plan, and actual marketing of the number to the public. The fruits of this investment belong to the subscriber and the subscriber alone. In fact, such vanity numbers have been subject to trademark protection as a means to prevent competitors from capitalizing on the trademark holder's investment and goodwill.[41]

Advocacy is very concerned that the actual implementation of these rules established in the *Second Report and Order* will impose egregious harm on the economic welfare of small businesses throughout the country that have value in and reasonable, productive, and prudent use for their toll free numbers. Failure to recognize the marketplace realities arguably supports a characterization of the Commission's *Order* as arbitrary.

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[40] *See Second Report and Order*, para. 31.